Court No.2

In the High Court of Uttaranchal at Nainital.

F.A.F.O. No. 574 of 2001.
(Old No. 105 of 1998)

(1) Union of India through Chief,
Engineer, Bareilly Zone, Sarvatra Bhawan,
Station Road, Bareilly Zone.
(2) Commander Works Engineer (Hills)
Pithoragrh.

……. Defendants/Appellants

Versus

(1)M/S Mago Construction Private Limited
(A Private Limited Company incorporated
under the Companies Act, 1955) having
its registered office at Dalip Cottage,
14, Kishan Gatrh, West Idgah, Agra.

……..Plaintiff/Respondent No.(1).

(2)Sri S.G.Mahajan CSW, Sole Arbitrator,
Office of the Standing Panel of Arbitrators,
5 Compbell Lines, Nehru Road, Lucknow Cantt.

……Defendant/Respondent (2)

Sri V.B.S.Negi, learned Sr.Central Govt.Standing Counsel for the appellant,
Sri I.P. Gairola, learned counsel for the respondent No.1.

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Dated: 21st Aug.,2004.

Hon'ble P.C.Verma,J.
Hon'ble B.S.Verma,J.

This is first appeal preferred by the appellant against the judgment and order dated 17.10.1997 passed by Additional Civil Judge (Senior Division), Nainital in Original Civil suit No. 96 of 1993, rejecting the objection of the appellants filed under Sec. 30/33 of the Arbitration Act and allowed the application moved by the opposite party No.1 under Sec. 14(2) of the Arbitration Act making the award of the Arbitrator dated 25.5.1993, rule of the court.

The learned counsel for the appellants pressed this appeal on three grounds. The first ground is that the arbitrator as well as court below making the award rule of court fell into error in granting interest on the amount awarded under the reference. We have gone through the entire record and find that the learned Civil judge has cited the case law of the Apex Court in the case ***Sudhir Brothers versus Delhi Development Authority [1996-SCC-1-32]*** in which the Hon'ble Supreme Court has held that *"the arbitrator has the power and jurisdiction to grant pre-reference in interest in references made after the coming into force of the Interest Act, 1978".* We find that the arbitrator as well as learned Civil Judge has not committed any error in granting the interest on the amount awarded and it was in accordance with the terms of contract agreement.

The second ground pressed by the learned counsel for the appellants is that according to clause No.23 of the contract agreement, the sales tax is inclusive on all the amounts. Therefore, the sales tax was payable in terms of the aforesaid clause of the agreement by the contractor himself. He could not claim reimbursement thereof from the Government. The Civil Judge fell into error in not considering the terms of the contract. Clause No.23 of the contract agreement reads as under:-

> "23. Tendered rates are inclusive of all taxes and levies to be borne by the contractor in terms of the conditions of the tender. In case any fresh law or statutary rule or order pursuant to 46th amendment to the constitution of India comes into force after submission of the tender by which the contractor has to pay tax (including sales tax) on:-

a) the transfer, otherwise than in pursuant of a contract of property in any goods for cash deferred payment or other valuable consideration.
b) the transfer of property in goods (whether as goods or in some other form) involved in the execution of works contract.

and the contractor thereupon necessarily and properly payus such tax, the contractor shall be reimbursed the amount in excess of his liability under the contract, provided such payment made, if any,1 is not in the opinion of CWE (whose decision shall be final and binding), attributable to delay in execution of work within the control of the contractor and provided the contracvtor gives written notice and keeps books of account and other documents as laid down in condition 63 of IAFW 2249.

Provided further that if fresh law or statutory rule or order consequent to 46th amendment to Constitution of India as aforesaid reduces the contractor's liability otherwise under the contract, the amount of such reduction shall be recovered from the contractor."

We find force in the contention of the learned counsel for the appellants that the contractor could not claim the reimbursement of the amount of sales tax. Since the term is very clear as quoted above that all the amounts payable to the contract shall be inclusive on all the taxes, therefore in view of this specific term of the contract the sales tax has wrongly been awarded. The court as well as arbitrator have misconstrued the aforesaid clause and have awarded the sales tax. A perusal of the clause it itself manifesting that the sales tax was not payable as it was inclusive on all the amounts of contract. Therefore, the award in respect of the reimbursement of the sales is contrary to the terms of the contract, which could not have been awarded.

Therefore, on this point we set aside the finding recorded by the arbitrator as well as Civil Judge (Senior Division) and provide that the sales tax as awarded shall not be payable to the contractor. The amount of sales tax Rs. 1,33,866.00 is liable to be deducted from the award.

The next point pressed is transportation of the bricks. The learned counsel for the appellants argued that in view of clause Nos. 4 & 10 of the agreement, the transportation charges were not to be paid to the Contractor as all the materials were to be supplied by the Contractor in terms of contract which included the transportation of the materials at the spot. The learned Arbitrator has interpreted this clause and gave its finding that in the contract it is mentioned that the bricks shall be locally available. The Union of India through an amendment deleted the word 'Local' on Page No. 170 of the contract agreement which gives the source of material. When this word 'Local' was deleted the Union of India should have given a proper source of bricks from which the contractor was expected to obtain it. Alternatively, if the intention of contract was not to give any source of bricks, the word 'locally available' should have been deleted from clause 4.1 on Page No.113 of the contract agreement. The Arbitrator came to the conclusion that this clause refers to the supplies which are being made locally. If the materials are to be transported from a distance, which cannot be said to be local, then transporation charges are liable to be paid and, accordingly, awarded the transportation charges. The learned Civil Judge making the award rule of the court has considered the said clause and came to the same conclusion. We have appreciated the aforesaid clause of the contract and found that the reasons given by the Arbitrator

as well as by the Civil Judge are in conformity with the words of the clause. Therefore, we do not find any infirmity in awarding the transportation charges.

No other point is pressed.

We find the award does not suffer from any misconduct on any other ground. Therefore, we affirmed the judgment dated 17.10.1997 impugned in this appeal making award rule of the court to the extent that amount of claim No.1 i.e. Rs. 1,33,866/-(Rupees one lac thirty three thousand eight hundred sixty six) shall be deducted. Claim of rests amounts shall be paid. Accordingly, the appeal is partly allowed. No order as to costs.

(B.S.Verma,J.) **(P.C.Verma,J.)**

P.Singh